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Supreme Court, U.S.
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No. 05-1439

IN THE

Supreme Court of the United States

MARY DEROCHE and ERIC DEROCHE,

Petitioners,

v.

ARIZONA INDUSTRIAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

Adhering to its prior precedent, the Ninth Circuit disposed of the DeRoches' claim for attorneys' fees through the application of a single rule of law that it first established over a decade ago: "attorney's fees are not recoverable in bankruptcy for litigating issues 'peculiar to federal bankruptcy law.'" Pet. App. 4a (quoting *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991)). Although the Ninth Circuit first applied its *Fobian* rule in the context of a claim for attorneys' fees arising under a contract, and the DeRoches' claim their fees pursuant to a state statute, the Ninth Circuit concluded that this distinction did not matter: "[w]hen, as here, federal and not state law governed the substantive issues involved in the [creditors'] motion, the bankruptcy court should not have awarded attorney's fees pursuant to a state statute." Pet. App. 8a-9a (quotation marks and citations omitted). Accordingly, the Ninth Circuit clearly transferred and applied its *Fobian* rule to claims for attorneys' fees arising under state statutes, reasoning that the source of the entitlement to the fees (contract or state statute) was not important.

Respondent concedes that there is a split of authority among the courts of appeals regarding whether attorneys' fees may be recovered in bankruptcy for litigating bankruptcy issues where the source of the claim is a contract. Pet. Op. 11. Respondent denies, however, that a split of authority exists where the source of the claim is a state statute. Respondent is mistaken. In *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286 (11th Cir. 2005), in which the debtor succeeded in recovering its attorneys' fees, the source of the litigant's entitlement to fees *was* a state statute. Respondent's attempt to distinguish *Martinez* is unavailing. More important, Respondent fails to explain why it makes a difference whether the particular case involves a claim for fees based on a contract or based on state statute. Under the Ninth Circuit's approach, the analysis is the same, and the conflict among the courts of appeals over the *Fobian* rule clearly encompasses both contractual and statutory entitlements to fees. Because the courts of appeals are divided over the question presented, certiorari is warranted.

Further, the Ninth Circuit's decision in this case conflicts with prior precedents of this Court, and is simply wrong. Under the Ninth Circuit's reasoning, a state cannot direct that its own agency must pay the attorneys' fees of a private citizen when the agency unsuccessfully litigates with the citizen over bankruptcy issues. There is no reason why a state should be prohibited from doing so, and the decision below demonstrates why the *Fobian* rule is unwarranted and inappropriate. Nothing in the Bankruptcy Code directs such a result, and the Ninth Circuit lacked the authority to create such a rule as a matter of general federal common law. Accordingly, certiorari is warranted.

A. The Circuits Are Divided Over The Question Presented.

Respondent concedes that the courts of appeals are in conflict concerning the Ninth Circuit's *Fobian* rule, but argues that the circuit split exists only with respect to the question of recovery of attorneys' fees in bankruptcy where *contracts* are involved, as compared with state *statutes* providing for such a recovery. Pet. Op. 11. Respondent is mistaken.

In *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286 (11th Cir. 2005), the debtor successfully recovered under a state statute its attorneys' fees incurred in litigating bankruptcy issues in bankruptcy court. The litigation in *Martinez* involved matters of bankruptcy law (the dischargeability of a debt), and no federal statute provided for the debtor's recovery of fees. Nevertheless, the debtor *did* recover its attorneys' fees, based upon a state statute providing that, if one party had a contractual right to attorneys' fees, the other party was deemed to enjoy the same right, if successful in the litigation. 416 F.3d at 1290-91.

Respondent argues that *Martinez* should be viewed as a "contract case" because the state statute at issue required that specific terms be read into contracts under state law. Pet. Op. 11. Far from demonstrating a material distinction, however, Respondent has shown that *Martinez supports* the DeRoches' position here as, absent the state statute in *Martinez*, there would have been no right to recover attorneys' fees. 416 F.3d at 1288-91.

The Ninth Circuit clearly has applied its *Fobian* rule to claims for attorneys' fees incurred in litigating bankruptcy issues when the claim arises as a matter of contract and when it arises by state statute. Other courts of appeals have rejected the *Fobian* rule in both contexts. Because the courts of appeals are plainly divided over the question presented, certiorari is warranted.

B. The Fobian Rule Conflicts With The Bankruptcy Code And With This Court's Precedents.

Respondent argues that the decision below does not conflict with prior decisions of this Court on the theory that, when substantive issues of federal law are involved, an award of attorneys' fees is not available unless federal law affirmatively authorizes the award. In support of this theory, Respondent cites *F.D. Rich. Co., Inc. v. United States*, 417 U.S. 116 (1974). Respondent's reliance on *F.D. Rich*, however, is misplaced.

The State of Arizona has enacted a statute directing that its agencies must pay the attorneys' fees of private citizens when agencies pursue litigation against them and lose. Nothing in the Bankruptcy Code even remotely purports to preempt this rule. Respondent does not contend that any provision of the Bankruptcy Code directs the result reached in this case. Nor does Respondent argue that the result below is necessary to fulfill any essential bankruptcy policy. Rather, Respondent simply asserts that, if federal law is implicated, preemption on the question of attorneys' fees is automatic. But that is not the law generally, and it is especially not the law under the Bankruptcy Code.

Respondent ignores, for example, section 541 of the Bankruptcy Code (preserving the debtor's rights for the benefit of the bankruptcy estate) and the extent to which bankruptcy law preserves a debtor's state law entitlements unless *expressly* displaced. *See* 11 U.S.C. § 541. As this Court has explained in the bankruptcy context, "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed any differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 55 (1979). The Court has further instructed that

bankruptcy courts should endeavor to "ensure that the [party] is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued." *Id.*; *see also Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 490-91 (3d Cir. 1997) ("As the legislative history for [section 541] specifies, 'The scope of this paragraph is broad. It includes all kinds of property, including tangible and intangible property, causes of action . . . and all other forms of property currently specified in section 70a of the Bankruptcy Act . . . .'") (citations omitted); *see also* 5 COLLIER ON BANKRUPTCY ¶ 541.04 (15th ed.) ("Paragraph 1 [of section 541(a)] is broad. It includes all kinds of property, including both tangible and intangible property, causes of action, and all other forms of property.").

Viewed in this light, Respondent's citation to sections of the Bankruptcy Code that specifically authorize awards of attorneys' fees in bankruptcy proceedings as a matter of federal law does not support the conclusion that these are the *only* instances in which fees may be awarded. The fact that Congress authorized the award of attorneys' fees in certain contexts merely supplements other authorization where, as here, the Bankruptcy Code generally preserves non-bankruptcy entitlements to fees.

C. This Case Presents An Ideal Vehicle For Resolution Of The Question Presented.

Respondent does not deny that the Ninth Circuit resolved the DeRoches' claim for attorneys' fees exclusively as a matter of law. Nor does Respondent deny that resolution of the question presented is outcome-determinative. The question presented involves an important and recurring issue. Accordingly, Petitioners respectfully request that the Court issue a writ of certiorari to review the decision of the court below.

CONCLUSION

For the foregoing reasons, the DeRoches respectfully request that the Court issue a writ of certiorari in this case.

Respectfully submitted,

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